Rock Valley Trucking Co., Inc. *and* James W. Teed. Case 30–CA–16997

June 25, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On September 25, 2006, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(1) by permanently laying off employee James Teed. We agree with the judge, for the reasons set forth in his decision, that Teed engaged in the protected concerted activity of talking with his fellow employees and the Respondent's general manager about Teed's view that some drivers were given preferential treatment in their driving assignments. We also agree that the Respondent had knowledge of that activity, and that these conversations were a motivating factor in the Respondent's decision to permanently lay off Teed.

We also agree with the judge's finding that the Respondent bore animus toward the protected concerted activity. However, we do not adopt the judge's analysis to the extent that his finding relied on a telephone conversation in July or August 2004 between the Respondent's general manager, Gerald (Jake) Saladis and Teed. Instead, we rely on other factors, as explained below, to establish that animus.

The credited facts are as follows. Teed telephoned Saladis and told him that he had learned from another employee that driver Bill Vick had 18,000 more miles on his truck than Teed did. Teed and Vick had been assigned their trucks on the same day, and Teed was concerned because the drivers' compensation was primarily based on the total miles driven per run, taking into account a $15-per-hour rate for downtime. Saladis responded that he would like to know who told Teed this because he would fire that employee on the spot. When Teed asked Saladis why he would do this, Saladis explained that for a driver to learn another driver's mileage, he would have to have gone into either the other driver's assigned vehicle or his personal mailbox to see his payroll records. Saladis told Teed that either of these transgressions was a fireable offense.

We agree with the judge that Saladis' comments to Teed did not constitute a threat in violation of Section 8(a)(1) for the reasons in the judge's decision. Thus, the judge found that Saladis was legitimately reacting to what he saw as a breach of company policy regarding employee privacy rights and that Saladis explained this to Teed.[3] The judge concluded that under these circumstances Saladis' statement did not violate Section 8(a)(1).[4]

However, in considering the allegation that the Respondent's permanent layoff of Teed was unlawful, the judge nonetheless relied on Saladis' comments in this telephone conversation to find evidence of the Respondent's animus towards Teed's protected concerted activity. We do not agree. Because Saladis' statement to Teed included an explanation of company policy and his valid concern in protecting employees' privacy, it cannot properly be interpreted to reflect animus against Teed's protected concerted activity.

Nevertheless, we find other indicia of animus by the Respondent against Teed's protected concerted activity. First, on about September 2, 2004, Teed found a message on his home telephone answering machine from Saladis asking Teed to meet him to discuss "a lot of talk lately . . . revolving around seniority and miles and things like that." This meeting turned out to be the September 4, 2004 meeting at which Teed was permanently laid off.

Second, at the September 4 meeting in Saladis' office, Saladis told Teed he had been selected for permanent

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the recommended Order to conform to the Board's standard language and have included a notice to conform to the Order as modified.

[3] In adopting the judge's dismissal of this allegation, however, we do not rely on his statement that Saladis' comments did not amount to an unlawful threat because the focus of Saladis' concern was the invasion of privacy by an employee other than Teed.

[4] There is no allegation that the company policy was unlawful.

layoff because Saladis had looked "over all the performance from every direction." In response to Teed's question, Saladis clarified this to mean "[a]ttitude . . . that's probably the biggest one." Saladis further clarified, "[A]nd this is part of the attitude you've accuse [sic] me of playing favorites as far as certain people go." Teed responded to this as referring to the mileage issue. This interchange, as well as the answering machine message, was recorded.[5]

These two recordings demonstrate that the Respondent harbored animus against Teed for his protected concerted activity. Thus, in both of these instances, Saladis' statements linked Teed's protected concerted activity of speaking up about the mileage issue with the Respondent's decision to permanently lay off Teed.[6]

Indeed, these recordings establish that the basis for the Respondent's selection of Teed for permanent layoff was his protected concerted activity. Saladis' statement to Teed in his September 2 telephone message telling Teed to meet him for what turned out to be a termination meeting first linked Teed's protected concerted activity to his layoff. Saladis' statements during the September 4 termination meeting further demonstrated that Teed's protected concerted activity not only was linked to, but, in Saladis' own words, played the "biggest" role in, the Respondent's decision to permanently lay off Teed.[7]

Given these statements by Saladis showing that the Respondent's basis for deciding to lay off Teed was Teed's protected concerted activity, we find that the Respondent has not met its burden of showing that it would have permanently laid off Teed absent his protected concerted activity.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Rock Valley Trucking Co., Inc., Janesville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently or indefinitely laying off employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James W. Teed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James W. Teed whole, with interest, for any loss of earnings and other benefits he may have suffered from his unlawful layoff, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify James W. Teed in writing that this has been done and that the layoff will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Janesville, Wisconsin, copies of the at-

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[5] Both recordings, and their transcripts, were admitted into evidence. The judge incorrectly described these recordings as being in Jt. Exh. 3. They were both in Jt. Exh. 1.

[6] It is well settled that an employer's reference to an employee's "attitude" can be a disguised reference to the employee's protected concerted activity. *Citizens Investment Services Corp.*, 342 NLRB 316, 328 (2004), enfd. 430 F.3d 1195 (D.C. Cir. 2005). Thus, the interchange between Saladis and Teed at the termination meeting, including in particular Saladis' reference to Teed's "attitude," explicitly connected the Respondent's concern with Teed's attitude with its concern about Teed's protected concerted activity.

[7] Teed was involved in three safety incidents. We agree with the judge that these incidents would not have led to Teed's layoff if he had not engaged in Sec. 7 activity. However, the judge made certain factual errors. The judge described the second incident as occurring in 2003. The record shows that this incident actually occurred in early August 2004, with Teed receiving a warning concerning it by August 31, 2004. The judge also stated that Saladis heard about this incident from Patricia Whitmore, the director of human relations for Hufcor, the Respondent's parent company, when he met with her on August 31, 2004. However, the record shows that the meeting occurred a couple of weeks earlier. None of these errors are prejudicial to our finding that the Respondent violated Sec. 8(a)(1) by permanently laying off Teed.

[8] Once the General Counsel has made a prima facie showing that protected activity was a motivating factor in a respondent's adverse action, the burden then shifts, of course, to the respondent to show that it would have taken the same action even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). For the reasons found by the judge, we agree that the Respondent did not meet its rebuttal burden.

tached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 25, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT permanently or indefinitely lay off employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James W. Teed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James W. Teed whole, with interest, for any loss of earnings and other benefits he may have suffered from his unlawful layoff.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of James W. Teed, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

ROCK VALLEY TRUCKING CO., INC.

Ryan Connolly, Esq., for the General Counsel.

Jonathan O. Levine, Esq. and *Lucas J. Thomas, Esq. (Michael Best & Friedrich LLP),* of Milwaukee, Wisconsin, for the Respondent.

James W. Teed, pro se, of South Beloit, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me on April 24–25 and May 24, 2006, in Milwaukee, Wisconsin, pursuant to an original charge filed on September 15, 2004, by James W. Teed against Rock Valley Trucking Co., Inc. (the Respondent); Teed filed an amended charge against the Respondent on November 15, 2004.

On December 22, 2004, the Acting Regional Director for Region 30 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that it violated Section 8(a)(1) of the National Labor Relations Act (the Act). On January 5, 2005, the Respondent timely filed its answer to the complaint essentially denying the commission of any unfair labor practices and asserting certain affirmative defenses.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire re-

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cord, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT

The Respondent maintains an office and place of business located in Janesville, Wisconsin, and has been engaged in the trucking business. The Respondent admits that during the past calendar year (2003) in conducting its business operations, it derived gross revenues in excess of $50,000 from the transport of freight from the State of Wisconsin directly to points outside of Wisconsin. Accordingly, I would find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. BACKGROUND AND OTHER PRELIMINARY MATTERS UNDISPUTED ON THE RECORD

As noted, the Respondent engages in the trucking business, mainly interstate or over-the-road shipment of products produced and distributed by its parent company, Hufcor, which manufactures accordion-type, paneled room dividers, called operable partition walls, for schools, hotels, casinos, and other concerns and institutions. The Respondent hauls freight solely for Hufcor, and as such is Rock Valley's sole customer.

On about November 18, 2002, Gerald (Jake) Saladis was hired as the company's general manager; he was promoted to vice president in the fall of 2005. As general manager, Saladis' responsibilities including hiring of drivers and other company staff, dispatching truck deliveries, procuring and maintaining vehicles, coordinating freight tariffs, negotiating freight tariffs with vendors, freight forwarders and outside freight carriers, and overseeing freight-related claims; Saladis also served as the transportation manager/facilitator for Hufcor.[1]

It is undisputed that the Respondent's business was changed operationally in significant and fundamental ways by Saladis who found the trucking concern in serious trouble and, in his words, "bar none the worse trucking company [he] had ever seen."[2]

Since at least January 2003, the Respondent has employed a complement of over-the-road truckdrivers who delivered Hufcor panels along the east coast as far south as the Florida Keys and as far west as the Rocky Mountains. From January 2003 through August 2004, the Respondent had an average of six full-time drivers and one part-time (casual) driver. In August 2004, however, the Respondent's full-time drivers complement increased to eight with two casual drivers.[3]

The Respondent's drivers are compensated primarily based on the number of total miles driven (around 38 cents per mile) per run, taking into account a $15-per-hour rate for downtime. The Respondent's drivers are also subject to Federal and State laws and regulations governing, among other things, the number of hours they are permitted to drive during a given period. As noted, during the relevant period, Saladis made all assignments of the Respondent's drivers.

During late summer 2004, Hufcor's management predicted that its business was going to suffer a serious downturn for the last quarter of that year. By August 2004, Hufcor's sales were down some 10–15 percent as compared to 2003. Hufcor reckoned that its financial position was worsening and pointing to one of the Company's worse years since 1999 for incoming sales, securements,[4] in company parlance. Hufcor's national commercial accounts manager, Scott Staedter,[5] informed Saladis around this time—August 2004—that Hufcor could expect a continuing downturn in sales for the balance of 2004 based on the current market trends, and that Hufcor would be embarking on a defensive business plan called "Fill the Funnel" which essentially entailed selling partitions at a break-even point so as to maintain sales volumes.

On September 4, 2004, the Respondent permanently laid off Teed, effective that date.

III. THE UNFAIR LABOR PRACTICES ALLEGATIONS

The complaint alleges in essence that in late July or August 2004, Saladis, in a telephone conversation with Teed, stated that employees would be terminated for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

The complaint also essentially alleges that during the summer of 2004, the Respondent's truckdrivers, including Teed, engaged in concerted activities for purposes of their mutual aid and protection by discussing the distribution of mileage among the Respondent's driver complement and that Teed was perma-

[1] In its answer, the Respondent denied that Saladis was either a supervisor and/or agent within the meaning of Sec. 2(11) or (13) of the Act. However, at the hearing, the Respondent's counsel conceded Saladis' supervisory/agency status at all material times. I would find and conclude that Saladis' testimony regarding his duties and responsibilities for the Respondent during the period covered by the complaint, as well as the record as a whole, fully support a finding that he was a statutory supervisor and/or agent within the meaning of the Act.

[2] Saladis cited a number of problems he encountered upon his assumption of the Rock Valley general manager's job, including prior management's evident disregard for Federal Department of Transportation regulations regarding the drivers' hours of service, along with outdated and unsafe equipment, including trucks. Saladis credibly testified that he instituted and implemented many changes in the Company's operation to bring it into compliance with the regulations and good business practice. Saladis also implemented changes to the assignment of drivers to dispatched routes and made personnel changes, including the hiring of a new driver and firing a driver who would not comply with the log book regulations overtime. Saladis also transferred drivers employed by a sister company, Eagle Transportation, for whom he acted as transportation manager to the Rock Valley payroll.

[3] See R. Exh. 9, a document entitled Driver Complement Summary which sets out the number of drivers full- and part-time employed by the Respondent during the period covering calendar years 2003, 2004, and February 2005.

[4] See R. Exhs. 6 and 7, copies of Hufcor's 5-year sales performance data year to date for calendar years 2000–2004, and 5-year sales performance data to the month of October in calendar years 2000–2004, respectively.

[5] Staedter credibly testified at the hearing and generally described Hufcor's relationship with Rock Valley and, in particular, Hufcor's financial condition during periods relevant to this case. Staedter impressed me as a witness; he was knowledgeable about the matters covered by his testimony, answering with equanimity questions posed by both the Respondent's counsel and the General Counsel.

nently laid off because of his involvement in these discussions, also in violation of Section 8(a)(1).

Teed testified at the hearing.

Teed stated that he worked for the Respondent for about 7 years as an over-the-road driver whose primary duties included delivering Hufcor panels to various commercial distributors as well as churches, schools, casinos, and hotels throughout primarily the eastern half of the United States.

Teed said that he was paid by the mile at the rate of 38 cents per mile and received $15 per hour for "downtime" incurred on the road because of delays by installers, breakdowns, or bad weather. Teed stated that mileage was significant and important to the drivers because their main income derived from hauling the Respondent's goods to various destinations.

Teed said that his employment with the Company ended on September 3, 2004; his supervisor at the time of his layoff was Jake Saladis for whom he had worked about 3 years and who made the decision to lay him off.

Teed related an incident that occurred during the week of April 18, 2004, in a conversation with fellow employee and driver Bill Vick at a truckstop located between New York City and Philadelphia, Pennsylvania; he and Vick were hauling two trailer loads to the same jobsite in New York at the time. According to Teed, the conversation turned to the topic of mileage, a frequent discussion point among the drivers, and Vick happened to mention the current mileage on his vehicle. Teed said that Vick's mileage was quite a bit higher than his,[6] which struck Teed as out of line since both he and Vick had been assigned new trucks on the same day. Teed said he asked Vick whether he charged the Company for downtime while on a run, and Vick said that he did not. Teed said that this conversation ended on this note.

Teed said that about a week later, he telephoned Saladis from the road while on a run and asked Saladis if he (Teed) would not charge the Company for downtime, would he be able to get some of the miles Vick was evidently receiving. According to Teed, Saladis asked him what he meant by the question. Teed explained that he had spoken with Vick who said that he did not charge for downtime, and that was the basis for his (Teed's) question. According to Teed, Saladis did not further respond to his query.

Teed said that a short time later—he was not certain about the dates—he spoke to fellow drivers Dave Olson, Dick Brown, Robert Pergande, and Robert Kross about Vick's mileage because he was generally concerned about all of the drivers getting their miles.[7]

Teed said that he spoke with Olson in the Hufcor parking lot about Vick's not charging the company downtime and that he and Vick had been assigned their vehicles on the same day;[8] that he (Teed) had about 100 original miles more than Vick on his odometer; yet Vick currently had about 16,000 more miles than he.

Teed also related another subsequent conversation with Olson, who on this occasion called him at home. In this conversation, Teed said that Olson told him that he (Olson) had been speaking with fellow driver Pergande in the Hufcor parking lot and there was told that Vick had 18,000 more miles than Teed; and Olson asked him whether he (Teed) was aware of this. Teed believed this conversation occurred in July or August 2004.

Teed related that his conversations with Kross and Brown also took place in the Hufcor parking lot in July or August 2004. Teed said that Kross approached him and started talking about mileage. Teed stated that he told Kross that Vick was getting more miles (around 18,000) than he in this conversation.

Teed stated that on another occasion in July or August, Dick Brown and he conversed in the same parking lot, and Brown brought up the subject of his not having enough miles. Teed said that he told Brown about the difference in miles between himself and Vick. According to Teed, even before being told about the mileage difference, Brown told him that he (Brown) had previously spoken to Saladis about mileage. According to Teed, Brown told him that Saladis had said that all the drivers were within 2500 miles of each other. Teed said that he told Brown that Saladis was lying because at that time Vick had 18,000 more miles than he. According to Teed, both he and Brown were perplexed over Saladis' remarks.

Teed said that he also had a conversation with Pergande in July or August at a truck stop where they stopped for a meal and discussed mileage, presumably in general terms.[9]

Teed stated that at some point—again, he was not sure of the date—he had another occasion to speak to Saladis about Vick's mileage.[10] According to Teed, while on the road, he called Saladis on his cell phone and informed him that a couple of drivers had called him (Teed) at home and said that Vick had 18,000 more miles on his truck than he.

According to Teed, Saladis said he would like to know who the drivers were, that he would fire them on the spot. Teed said that he responded, telling Saladis that he would not divulge the drivers' identities because he was not going to be responsible for their losing their jobs. According to Teed, Saladis persisted, repeating that he would like to know who the drivers were, because he would fire them on the spot. Teed said the conversation basically ended without further discussion of the mileage issue.

Teed related the circumstances leading to his being laid off by Saladis on September 4, 2004.

According to Teed, he received a message from Saladis on his telephone answering machine on about September 2, 2004, asking him to come to work and discuss "a lot of talk lately . . .

[6] Teed could not recall how much higher was Vick's mileage than his in this conversation.

[7] Teed believed that he and Vick were assigned new trucks in January 2002. He probably was mistaken since Saladis said that he did not come on board until November 2002 and that he ordered new vehicles around January 2003.

[8] I should note that Teed had particular difficulty recalling dates, but he seemed sure that the conversations occurred in the summer, in July or August 2004. Olson did not testify at the hearing.

[9] Teed did not testify that Vick's mileage was raised in his discussion with Pergande.

[10] Here, too, Teed believed this conversation took place in July or August 2004.

revolving around seniority and miles and things like that."[11] Acting on this request, Teed said that he called Saladis that afternoon of September 2 and arranged to meet with him on Friday, September 4, at around 9 a.m.

Teed said that on that Friday, he met with Saladis and Hufcor's human relations director, Pat Whitmore, in Saladis' office; Teed said that he recorded this meeting on his digital recorder. Teed stated that he was informed at this meeting that he was being laid off, ostensibly in his view because Hufcor was experiencing a business slowdown and Rock Valley had too many drivers for the workload.[12]

Teed said that at this meeting he did not challenge Saladis' claim that there were too many drivers for the available work because the drivers had discussed among themselves that they were not getting enough miles.[13] Teed said at the conclusion of the meeting, he was informed of the indefinite nature of his layoff, and he went home to get his car so that he could retrieve his personal belongings from his truck.

Teed volunteered that he came to the exit meeting fully expecting to be fired because of the mileage issues and came to the meeting armed with his recorder. Teed admitted that he raised his voice at the meeting, but not out of anger. Rather, he attributed his behavior to built-up frustration and his tendency to become loud when he gets excited.[14]

Driver Robert Kross testified at the hearing at the instance of the General Counsel.

Kross stated that he worked for Rock Valley Trucking for about 16-1/2 years as a driver; he terminated his employment in September 2004 because of a lack of work.[15] Kross stated that his supervisor at the time of his leaving the Company was Saladis.

By way of background, Kross stated that he had a break in his employment with Rock Valley due to a mild stroke he suffered on July 11, 2003. Although he returned to work almost immediately after the stroke, Kross said he was informed by his physician on February 28, 2004, that by law, he could not return to driving for 1 year. Accordingly, he was on medical leave until July 2004 when he returned to work.

Kross said that upon his return, he determined that the miles he was being given were only sufficient to meet his basic personal expenses, he was just able to make enough to pay his insurance copays and clear about $100 per week which was not satisfactory. Kross said he complained to Saladis about this on almost a weekly basis.

Kross said the drivers talked among themselves about the way things were going and that he and Teed spoke with the other drivers frequently during the summer of 2004.

Kross related a conversation with Teed in the company parking lot. According to Kross, he was on his way to speak to Frank Scot, a Hufcor officer,[16] about "the way things were going" and Teed asked him to discuss the matter involving Bill Vick's mileage. Kross said that Teed told him that he (Teed) and Vick had been assigned their respective trucks on the same day, with only about 100 miles difference in their odometers; but now there was a difference of around 17,000 miles between the vehicles.

Kross said that he was concerned about mileage and had spoken to Saladis about the methodology he employed for assigning runs about 2 weeks before he spoke to Scot, as he had been given to understand that Saladis was telling the drivers that only about 2500 miles separated the highest from the lowest driver. More importantly, he was concerned that Saladis did not honor driver seniority in the assignment of the more lucrative runs and had abandoned the old company practice of assigning drivers a long run, then a short run in an alternating pattern. Kross admitted that he (and the other more senior drivers) favored the seniority system and did not like the newer drivers being assigned the better (higher mileage) runs. Furthermore, Kross said that he and Teed in their discussions were united in their belief that the runs were not being assigned equally.[17]

Kross noted that during one of these discussions, there were three or four drivers standing about, and Teed said that Saladis was claiming that there were only 2500 miles separating the highest and lowest drivers, but that Vick's truck had 17,000 more miles on his truck which was assigned the same day as Teed.

After speaking with Teed, Kross met with Scot in his office. Kross recorded the meeting at which he discussed with Scot his

[11] Teed rerecorded this message onto a compact disc; the General Counsel also prepared a transcript of this record. See Jt. Exh. 3, the CD, and GC Exh. 2, the transcript of this message. Teed said that he erased the original recording on his answering machine after transferring the message to the CD. The quoted language is from the transcript.

[12] See GC Exh. 3, the transcript of this exit meeting, and Jt. Exh. 3, the CD copy of the recorded meeting. The recording (and transcript) indicates that Saladis and Teed discussed Teed's performance and "attitude" toward Saladis and his job in general.

[13] Teed noted that he had spoken to drivers Kross and Olson during the year (2004) about not getting sufficient miles to retain their employment. According to Teed, Olson worried whether he was going to be employed and Kross expressed concerns about losing his personal truck and home. The fear was that Saladis was hiring too many drivers for the available work.

[14] Teed also admitted that when he returned to the workplace to retrieve his personal items, his son accompanied him and threatened Saladis, saying to him "watch your back." Teed said that he remonstrated his son on the spot, telling him, "that is enough of that, just let it go." (Tr. 132.)

[15] Kross, like all of the Respondent's drivers, said his duties included delivering Hufcor products for which he was paid by the mile and hourly.

[16] Frank Scot is listed in the complaint as the Respondent's treasurer. In its answer, the Respondent denied that Scot was a supervisor and/or agent within the meaning of the Act. However, at the hearing, the Respondent conceded that he was either a supervisor or agent within the meaning of Sec. 2(11) or (13) of the Act. Scot did not testify at the hearing, but the record as a whole supports a finding that he is a statutory or supervisory agent within the meaning of the Act, and I would so find. See GC Exh. 5, p.2.

[17] Kross could not be precise about the dates of these discussions with Teed but was sure they took place after July 2004 when he returned from medical leave.

concerns about the Company's operation under Saladis.[18] Kross said that after this meeting he left the facility and did not speak to any manager regarding the issues covered in the meeting that day. However, Kross said that a day or 2 later, he spoke to Saladis alone in Saladis' office, as Scot had suggested.

According to Kross, he told Saladis that he was unhappy about the way things were going, that he (Kross) was only receiving short runs, and while the better (longer) runs had been cancelled for one reason or another, leaving him in a position where he could not support himself.[19] According to Kross, Saladis misinterpreted the nature of his complaint and said that he (Saladis) could not out of fairness to the other drivers assign Kross all the good runs. Kross testified that he was arguing for the old system of drivers being assigned long and short runs alternately, as opposed to his getting only short mileage runs.

Kross noted that when Saladis was first hired, he followed the old assignment practice but then evidently had instituted a change in the policy by the time he returned from medical leave. Kross said he was really concerned about mileage or lack thereof and in the end decided to quit because of lack of work.

The Respondent called Saladis who testified to the circumstances that led to his layoff of Teed.

Saladis stated that when he was hired in November 2002 and encountered the operational disarray of the Company, he instituted many changes to the way the business was being run. Saladis conceded that there was a fairly negative reaction to the changes by the drivers who not only complained to his supervisor, Frank Scot, but asked for a meeting with him out of their concerns about his management style. Saladis said that Scot informed him that a driver, Dick Brown, had asked for a meeting to discuss the changes being implemented. Scot said that he (Saladis) should be in attendance.

Saladis said the meeting was held in the spring of 2003 around March and several drivers, including Teed, Brown, and Kross attended, along with Scot and himself.

At this meeting, Teed complained of being offended because he (Saladis) had used one of his runs as an example of a driver's taking an inefficient route back to the facility.[20] Saladis said that he admitted that he had done this and apologized to Teed. Saladis explained that other issues were covered, including his changed route assignment procedure whereby he attempted to "even out" the miles the drivers were receiving by assigning drivers with the least amount of miles longer trips, and giving all drivers some choice about available assignments.

Saladis admitted that initially he was angry over being called to the meeting by his boss because he was busy trying to get the Company on a good footing and felt that the drivers were talking behind his back. However, he came to the realization that in his zeal to improve the Company's operations, he had had overlooked the possibly legitimate concerns of the drivers. So he listened to their complaints and concerns, including unequal treatment and being given different information, and promised them at the first meeting that he would issue an employee handbook to regularize the Company's procedures.

Saladis conceded that mileage—the amount a driver receives—is important to the drivers as they are paid by the mile, and it is "extremely" common for him to be part of discussions with the drivers regarding the assignment of mileage pay. (Tr. 299.)[21] Saladis could not, however, recall whether the mileage issue came up in this first meeting in 2003.

Saladis said the first meeting prompted a second meeting a few months later with the drivers and at which the promised handbook was made available. Saladis explained that the handbook covered certain key points as determined from comments made by the drivers in a survey he circulated to them about 2 weeks before the second meeting; the results of the survey were discussed at this meeting.[22]

According to Saladis, when he informed the assembled drivers that falsifying downtime or mileage would be cause for immediate termination, Teed took this as a personal affront. Saladis said that he asked Teed why he was reacting so strongly to this provision and Teed said that he viewed the policy as an affront to his character, he would never do anything like falsifying records for [downtime or mileage] or anything like that.

Saladis explained that he got along fairly well with Teed at first and, because Teed's wife was employed by Hufcor as a mail clerk who delivered to the Rock Valley facility, he spoke with Teed quite often. However, their relationship soured when he and Teed happened to have a disagreement and Teed "blew up." Thereafter, both Teed and his wife were unfriendly.

As time went on, Saladis said he had quite a few disagreements with Teed who, if things did not go his way, would react with yelling and profanity, turn himself off, and be so unreachable that he could not get through to him or reason with him. Saladis testified that to him, Teed was a person for whom there was nothing he (Saladis) could do that was good enough; Teed

[18] GC Exh. 6 is a transcript of the recorded meeting. Jt. Exh. 2 is a copy of the CD onto which the recorded conversations between Scot ad Kross were transferred.

[19] In pertinent part, the recorded conversation between Kross and Scot discloses that Kross told Scot that he was working so little—only "two decent runs"—since he returned to work that he was seriously considering filing for bankruptcy and was in danger of losing his house and personal pickup truck. Kross also complained about the new drivers receiving more runs than the more senior drivers, especially Bill Vick whom Scot knew. Kross told Scot that Vick and Teed were assigned their vehicles the same day with a 100-mile difference and that Teed said Vick currently had 19,000 more miles than he (Teed). Kross remarked that "we're all worried we really are about Saladis' making the statement to a bunch of them [drivers] that it's in with the new and . . . out with the old." Scot said to discuss the matter with Saladis. Kross countered, saying that we [the drivers] have talked to him about it, but not using the same facts he related to Scot.

[20] Teed confirmed that he took umbrage over Saladis' questioning of his downtime in his wage report. (Tr. 61.)

[21] Saladis elaborated, saying that basically weekly he would call a driver to assign a route and the driver would remark that the run was needed because he had only (for example) 600 miles for the week and needed a long run. Saladis stated that "[mileage] is a continual and constant [point of] discussion." (Tr. 300.)

[22] The handbook was not produced at the hearing, nor was the survey. Saladis said that some of the covered items were what constituted a compensatory stop for purposes of determining downtime; falsification of downtime or mileage, a fireable offense. I note that the existence of the handbook (and its pertinent contents) is not disputed.

also was not willing to accommodate customers or the Company. If there were problems, Teed simply "blew up" and became dismissive, according to Saladis.

Saladis also testified about certain disciplinary issues he experienced with Teed. Saladis identified a written disciplinary notice dated September 23, 2003,[23] that he issued to Teed for damaging his truck and driving it in a damaged condition in violation of safety rules and causing further damage to the vehicle. Teed was notified that he would not receive his annual (for 2003) safety award/bonus because of this infraction. Saladis stated that he spoke to Teed about the incident and Teed said that prior management told drivers to drive a damaged truck back to the Company because it would be cheaper to repair them at home. However, Saladis said the tie rod on the vehicle was severely damaged and Tee's claim that the vehicle was damaged when he was stuck in red clay seemed implausible. Saladis conceded that at this time, his relationship with Teed had really soured, steadily gone downhill to the extent that they could not sit down and discuss an issue without tempers flaring.[24]

Saladis turned to a verbal warning he issued to Teed sometime in 2003. Saladis explained that he was informed by Pat Whitmore, director of human resources for Hufcor, that one of her employees witnessed Teed pulling away from the loading dock with the truck's crane arms unsecured, posing a safety issue. Saladis said he contacted the witnessing employee—Jamie Becker—to confirm the incident and later confronted Teed who denied the allegations. Saladis said that he again contacted Becker and she again reaffirmed her observation of Teed's operation of the vehicle. Saladis testified that he believed her, reasoning that she had nothing to gain. He informed Teed of his conclusion and told him not to repeat the violation or face further discipline. He memorialized the incident with the writeup.[25]

Saladis issued a disciplinary warning to Teed on September 2, 2004.[26] According to Saladis, he received a call from the company from whom Rock Valley leases its trailers and handles vehicle maintenance, informing him that a trailer had suffered a blown tire but had been driven many miles in this condition. After conducting an investigation, Saladis determined that Teed had used this trailer last and called him about the matter. Saladis said that Teed told him that he had performed his posttrip inspection of the trailer and it was in proper repair; Teed specifically denied driving the vehicle with a flat tire with only the side walls remaining. In spite of Teed's denial, Saladis said he gave Teed a verbal warning, informed him of the Company's policy governing such matters, and requested that he not repeat the offense.

Saladis said that around the week before this incident, he had decided to lay Teed off and had spoken to Whitmore about his decision at that time. According to Saladis, Whitmore advised him to make note of whatever disciplinary action he had taken with Teed, as well as any other problems with him. Accordingly, he wrote Teed up on September 2, about 2 days before he was let go.[27]

Saladis went on to say that Hufcor's business is seasonal in a sense and, in 2004,[28] the business was declining rapidly. As a result, drivers were concerned about there not being enough work for them. He noted that by July–August 2004, drivers Kross and Schereck returned to duty and, in August, Hufcor's business actually was very good. However, by the end of August, based on Hufcor's forecasts, he anticipated problems and started considering laying off one full-time driver.

At this time, Saladis said that he employed eight full-time drivers—Brown, Kross, Pergande, Olson, Schereck, Austin, Vick, and Teed.[29] According to Saladis, he considered Brown to be a good employee—conscientious, and one who worked well with the customers; Pergande and Vick were his number one and two drivers; and Austin was a really solid employee; neither of these men was considered for layoff. Saladis stated that Schereck was also not considered for layoff because he had just returned to work from workman's compensation leave and he (Saladis) felt a layoff would not be lawful. Also, Schereck was a good worker who had been complemented by customers.

[23] See R. Exh. 1, a copy of the notice. Saladis made a notation that Teed would not sign the notice. However, he explained that he left a copy of the notice in Teed's mailbox, and Teed did not sign it. He assumed Teed would not sign it. However, he admitted at the hearing that Teed did not, in a strict sense, refuse to sign the notice. Saladis also explained the driving event took place on August 29, 2003, but he did not write Teed up until September 23 because the Company's maintenance department did not complete its investigation and inform him what occurred until then.

[24] As he testified about the damaged vehicle and the steady deterioration of his relationship with Teed, Saladis exhibited a baleful and exasperated facial expression, and he stated that he had reached a "point of resignation" with Teed. (Tr. 312.) According to Saladis, the breakdown in their relationship occurred about a year before Teed was let go. Saladis confessed to being very angry even as he testified about the events covered in his testimony. (Tr. 361.)

[25] This undated "verbal" warning is contained in R. Exh. 2 and purports to memorialize his warning to Teed about his driving his truck with the crane arms unsecured. Saladis could not recall when he drafted the warning but, upon prompting of the Respondent's counsel, recalled that this incident cost Teed his safety bonus for calendar year 2003. Saladis maintained that this was a verbal warning, so he did not ask Teed to sign it, but it would have been placed in Teed's mailbox. Saladis testified that he was unsure where this warning stood in the Company's disciplinary handbook. Saladis admitted that while he considered the infraction to be severe, he did not follow any particular company guidelines in making this assessment. I note that Saladis did not seem sure of the date of the infraction and had testified that the September 23, 2003 disciplinary action had cost Teed his 2003 safety bonus.

[26] See R. Exh. 8.

[27] I note that it would appear that since Saladis' decision to lay off Teed had already been made in August. Accordingly, in my view, the September 2 writeup seemingly had little or no bearing on Saladis' decision to lay off Teed.

[28] Several drivers who testified at the hearing stated that, in their view, Hufcor's business was not seasonal although they conceded the Company's busiest time is around the customary beginning of the school year—late July, August, and the beginning of September—because some of the Company's largest accounts are schools.

[29] See R. Exh. 9; the Respondent's driver complement included eight full-time drivers and two casual drivers. Saladis said that he did not consider laying off the two casual drivers as they were only called upon when the full-time drivers were unavailable.

Saladis said that he considered Kross for layoff "because of his hygiene, late showups, and some customer complaints." He considered Olson for layoff because he tended to push the limits of his schedule and sometimes tried to pressure customers into taking delivery of loads in advance of their needs. According to Saladis, he had not decided between Olson, Kross, and Teed for layoff and in this regard he took a "pros and cons" approach.

Saladis said he viewed Kross as a work in progress, one that he had been working on for a number of years; he felt sorry for Kross who had just gotten back from medical leave and was having bad luck with canceled runs. Saladis said he did not have the heart to lay him off.

Regarding Olson, Saladis said that he acknowledged Olson's problems with customers, but, nonetheless, Olson had a good safety record and never had lost his safety bonus. Saladis said that he believed he could change Olson's behavior.

Turning to Teed, Saladis noted that Teed was the only driver in Rock Valley's history who had lost his safety bonus and, in fact, had three safety-related incidents within a year's time. Saladis said that he also was influenced by Teed's attitude on and toward his job. Saladis considered Teed to be uncooperative, always grumbling about one thing or the other and never taking responsibility for anything. Saladis said he felt that Teed thought that the Company owed him and so would not accommodate himself to the Company's needs. Moreover, according to Saladis, he felt that Teed was beginning to be less attentive to the safe operation of his vehicle and had compiled what he considered to be a pattern of safety issues. For these reasons, Saladis said he decided to let Teed go.[30]

Accordingly, he consulted with the Company's human resources officer, Pat Whitmore, and together they devised an agenda to meet with Teed and inform him of the decision. Saladis admitted that he called Teed and asked him to come in but did not tell him the purpose of the meeting because he felt that this was not the safe thing to so.[31]

Saladis, Whitmore, and Teed met on September 4 in Saladis' office and Saladis then informed Teed of his being permanently laid off.[32]

Saladis acknowledged the meeting did not go as he planned which was essentially to avoid a discussion of specifics such as Teed's performance issues consisting of safety, attitude, and customer service because he felt this would escalate into an argument. Saladis admitted that he did not mention Teed's safety issues at the meeting, but this was because he was not given the chance.

Saladis conceded that he knew Teed was unhappy about the assignment of mileage because it was an ongoing thing along with his complaints about "everything." Saladis also acknowledged that one of Teed's biggest problems seemed to revolve around Vick from the time Vick was hired, and that Teed would constantly complain that Vick had more miles on his truck.

On this score, Saladis recalled a telephone conversation he had with Teed in early summer 2004; Teed had called him. According to Saladis, Teed said that another driver had told him that Vick had 18,000 more miles on his truck than he, although both drivers had been assigned their respective vehicles at the same time; Teed asked why this was so.

Saladis testified that it was fairly clear to him that Teed had some ulterior motive (an "agenda"), that he was trying to get to something. Accordingly, Saladis responded to Teed by saying that he (Saladis) wished he knew who that driver was; Teed then asked why. Saladis said he then said, "I would fire him on the spot." Whereupon Teed asked why would he do that. Saladis said he told Teed because there were only two ways to get that information—(1) either by going into the truck itself (without the driver's permission), which is not allowed and is a fireable offense; or (2) by going into the driver's mailbox and examining his payroll records, also a fireable offense. Saladis said that Teed in response said that he had heard Vick does not turn in his downtime and if he (Teed) did not turn in his downtime, could he have some of those good runs. Saladis said that he told Teed that that was not only ridiculous but was untrue; that Teed was to be paid for his downtime not only because he was entitled, but because he (Saladis) wanted to keep track of driver performance as well as that of the customers who may be contributing on their end to driver downtime and should be held to account.

Saladis defended his layoff of Teed, saying that the layoff was for good reason although he admitted that at the time of the layoff, he was more frustrated than angry with three of his drivers—Teed, Olson, and Kross—whom he described as continually changing their charges against the Company to "whatever the flavor of the day is." (Tr. 362.)[33] Saladis stated that he felt he was being persecuted by the three.

Saladis said that Kross quit after Teed was laid off, and Olson was terminated thereafter for violating the Company's log book rules. At the time of the hearing; Rock Valley had retained six full-time drivers and one casual driver.

Hufcor's vice president for human resources, Pat Whitmore, testified at the hearing and confirmed that while she had no part in the decision to lay off Teed, Saladis, around the week of August 16, 2004, informed her that because of the turndown in Hufcor's business prospects, he was planning to lay off one driver in a couple of weeks. According to Whitmore, Saladis said that he had considered Teed's singular safety issues, as well as Teed's confrontational manner and the generally difficult working relationship he had with Teed, and would probably select him for layoff. Whitmore testified that she advised Saladis to be objective in the process and offered to meet with

[30] Saladis added that other drivers told him that Teed complained about things. At the end, Saladis said he got sick of even calling him to try to work things out.

[31] Saladis testified that he reviewed the transcript of the voice mail message (GC Exh. 2) he supposedly left for Teed, but denied he left any instruction for Teed to come in. On cross-examination, Saladis (having audited the CD recording) agreed that the voice on the voice mail was indeed his.

[32] As noted, this meeting was taped by Teed. Saladis generally agreed that the recorded conversation was accurate.

[33] As noted, Kross said he voluntarily left the Company, claiming a lack of work after Teed's layoff. He admitted to filing NLRB charges and a State of Wisconsin discrimination action against the Company. The Board and State charges were dismissed. See R. Exh. 3.

him to discuss the layoff process; however, she would be on vacation until late August.[34]

Whitmore said that she met with Saladis around August 31 and Saladis advised her that he had indeed selected Teed for layoff. Whitmore said that she wanted Saladis to have all the information necessary to effectuate the layoff and advised him that one of her employees had observed Teed operating his vehicle with the loading crane arms unsecured.[35]

Whitmore noted that 2004 was not a good year for Hufcor's business, that between December 2003 and February 2004 Hufcor laid off about 80 factory workers; in June 2004, Hufcor laid off another 6–8 employees in the front office. Accordingly, Whitmore said that when Saladis came to her office about his having considered a driver reduction, she was not surprised. She further noted that it was her opinion at the time that business was not going to improve for the balance of the year and that Saladis would be overstaffed in terms of his driver complement.

Whitmore said she met with Saladis on August 31, and at the time Saladis confirmed that Teed was to be laid off. The meeting lasted about 30–45 minutes and covered some of Teed's safety issues. According to Whitmore, she then brought up the matter of Teed's having been observed by one of her employees, Jamie Becker, driving his trailer with the loading crane arms unsecured and inquired of him whether he had followed up on the matter. Saladis said that he had checked with Becker.

Whitmore stated that she had known Teed and Saladis did not enjoy a good working relationship, that Teed was very confrontational and negative, and at times appeared very angry. While Teed and Saladis seemingly did not work well with one and the other, Whitmore believed that Saladis was managing any conflicts between them. According to Whitmore, Saladis believed at the time that Teed also was one of his weakest performers.[36]

Whitmore said that her procedure in a layoff scenario is to take the manager through the process, instructing how it should be handled, and that her role also included explaining to the employee his benefits. Whitmore said that she encouraged Saladis not to engage in a lot of discussion with Teed and not to explain in detail why he had been selected, that he (Saladis) should focus on business conditions. According to Whitmore, Saladis was concerned about Teed's temper and they discussed various scenarios and even engaged in role playing in anticipation of Teed's possible negative reaction to the news.

Whitmore said Teed's exit meeting was scheduled for Friday, September 4, by Saladis and herself because she was not available on Thursday.

Whitmore testified that she attended the exit meeting. She had also listened to Teed's taped recording of the session and read the transcript thereof entered into evidence at the hearing. According to Whitmore, the transcript is fairly accurate, however, she recalled that the inaudible parts of the tape dealt with Saladis' attempt to tell Teed that he did not want to go into detail regarding his decision to lay Teed off, but business conditions dictated the move. Whitmore said that neither the taped recording nor the transcript reflect Teed's growing anger at the meeting and how very angry Teed ultimately became.[37] According to Whitmore, the meeting did not proceed in the way she would have wanted. There was too much in the way of confrontation, and Teed was so angry in her view that she instructed Saladis not to meet with Teed alone in the parking lot (where Teed was to retrieve his personal items) out of her fear there would be a physical confrontation between the two.[38]

The Respondent also called Richard Brown and Robert Pergande, current drivers of the Respondent, to testify on its behalf.

Brown testified that he has been in the trucking industry for about 27 years and has worked for Rock Valley directly since 2003. Prior to 2003, since around October 1999, he worked for Eagle Transport, but while there drove 90 percent of his time for Rock Valley for whom he permanently hired on when Eagle ceased business operations.

Brown stated that Saladis came on board with the Respondent in November 2002 or 2003,[39] and immediately instituted what he (Brown) described as "standing operating procedures" that he wanted the drivers to follow. Basically, according to Brown, Saladis wanted things to be done by the book and sought to impose discipline in the system and on the drivers.

Brown explained that prior to Saladis, the drivers generally did what they wanted. However, Saladis demanded that the drivers "run legal," required that they keep accurate driver log books, loads had to be delivered on time, and driver time and loads had to be accounted for. Saladis also changed the way mileage was distributed among the drivers, including spreading the routes—the good and bad ones—around,[40] in effect taking the choice of routes from the drivers. Saladis assigned routes based on driver availability, including a consideration of whether the driver was legally able to drive; that is, whether, under the hours of service regulations, a driver could go back on the road. According to Brown, he rebelled initially against Saladis' management style, which he admitted required him to adjust from a lax system to one requiring that everything be done by the book. Brown also stated that other drivers, including Olson, Kross, and Teed, rebelled similarly. Teed, in particular, did not like the way runs were being distributed and did

[34] Whitmore stated that part of her role with Rock Valley is to advise and work with managers who have decided that a layoff was appropriate in terms of guiding them through the Company's layoff procedures.

[35] I note that Saladis previously testified that Whitmore in 2003 had advised him of this incident and he had issued a discipline to Teed.

[36] Interestingly, Saladis stated that at the time of his layoff, Teed was the second highest paid driver in 2004, behind Vick; about $3000 or less separated the two. Saladis also indicated that at some unstated point, Teed was the highest paid driver for Rock Valley.

[37] Whitmore elaborated on Teed's anger, saying that his body language, his raised voice, his repeated interruptions, "lots of interruptions," made the conversations not flow well. (Tr. 415.)

[38] As noted, Saladis did not need this advice.

[39] I note Brown had some difficulties with recalling dates.

[40] Brown gave as an example his having almost exclusively and strictly been assigned to East Coast runs, which other drivers, including him, found undesirable. By contrast, all the drivers liked the Florida runs because these garnered the most miles. Prior to Saladis' arrival, Dave Olson seemed to get these preferred routes all the time. Notably, Brown said that prior to Saladis, neither Teed nor Kross was assigned any of these preferred routes.

not like Saladis' rules. Brown admitted that he did not like the way runs were distributed, or Saladis' rules either.

Brown said that under Saladis' system, sometimes he would receive a long run, then a short run, and then a long run. However, during some weeks, he would get only short runs. Brown says his runs would often be dependent on when he returned from a run. Brown was not sure but thought that Saladis was attempting to assign drivers long and short runs alternately, or even giving drivers a couple of weeks with long runs back-to-back. Brown conceded that Saladis spoke of trying to make the runs equal for all drivers so that everyone would receive equal mileage.

Nevertheless, the drivers complained and Brown said he tried to talk with Saladis about these matters. Eventually, within a few months of Saladis' start with the Company and with the drivers rebelling against him, Teed, and Kross, and he met with Frank Scot and Saladis to discuss their concerns. Brown said that he, Teed, and Kross addressed their concerns abut safety bonuses (Teed thought he was not going to receive his), the vehicles they were driving, and general concerns about the way they felt they were being treated. According to Brown, management was not apparently hostile and seemed to listen sincerely to their grievances. Moreover, no adverse actions, to his knowledge, were taken against any of them. Brown said that Teed was outspoken at the meeting as was he. Kross also addressed matters of concern to him at this meeting.

Brown said that about 3–5 months after this initial meeting (in the fall), management called a second meeting with all of the drivers,[41] who were invited to express their views or complaints on issues covering wages, company operating procedures, and work conditions. As a result of their meeting, among other things, a handbook was published by management and other procedures were committed to written form; drivers were also informed as to what their wages were. Essentially, according to Brown, everything was committed to writing.

Brown stated that there was friction between Teed and Saladis, with Teed not liking the way Saladis did things almost from the beginning. According to Brown, Teed and Saladis locked horns and Teed seemed to become angry easily in his dealings with Saladis.

According to Brown, drivers expect some privacy with respect to their vehicles but, speaking for himself, he did not care if another driver went into his truck. Brown intimated that while the drivers trusted each other, he would respect driver privacy and property.

Brown recalled conversations (more than one in his words) with Teed about the mileage on Vick's truck which was assigned to him at the same time Teed was assigned his. However, Vick had considerably more miles on his truck and that was a significant concern to Teed. Brown stated that this variance was also a concern to him because drivers are paid by the mile.[42]

[41] Brown identified the attending drivers as Teed, Kross, Olson, Vick, Shereck, Pergande, and himself.

[42] Brown could not recall the dates of these conversations which he said just happened on the occasions when he and Teed happened to meet with each other.

Pergande stated that he is currently employed by the Respondent as an over-the-road driver. He has worked for Rock Valley full time for a little over 2 years although he has been in the trucking industry for about 25 years, during most of which time he was a driver.[43]

Pergande testified that while all drivers have keys to all of the Rock Valley trucks (all trucks are keyed the same), he considered his assigned truck a private place like his home and that most drivers did not go into each other's truck. He personally believed that no driver should violate another driver's privacy and that he has never witnessed anyone going into his truck or other drivers' trucks without first obtaining permission. This was a general understanding among the drivers, according to Pergande.

Pergande said that he knew Teed and has seen him going into Bill Vick's truck. However, he also observed Olson checking the mileage on Vick's and Teed's respective trucks at some point.

Pergande testified that he has had conversations at different times with Teed about his relationship with Saladis, and Teed said that if Saladis tried to fire him, he would resist him.

IV. APPLICABLE LEGAL PRINCIPLES

The complaint, as previously noted, alleges that the Respondent, through Saladis, violated Section 8(a)(1) of the Act by first threatening employees, specifically Teed, with termination for engaging in protected concerted activities and, second, by terminating him for engaging in concerted protected activities. A discussion of the principles applicable to allegations of violation of this dection of the Act will be helpful.

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."[44] Thus, in short, employees have the statutory right to, in concert, take action for better job conditions.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7."[45] The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act.[46]

[43] Pergande noted that prior to working for Rock Valley, he worked for Eagle Transport, Rock Valley's sister company. He noted that while employed by Eagle, he worked as a casual or part-time driver for Rock Valley for whom he started working full time around February 23, 2004.

[44] 29 U.S.C. § 151.

[45] 29 U.S.C. § 152.

[46] *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.,* 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959).

Thus, it is violative of the Act for the employer or its supervisors and agents to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.,* 310 NLRB 1197 (1993); *Williamhouse of California, Inc.,* 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors),* 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1176 (1984). enfd. sub nom. *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

Lastly, Section 8(c) of the Act provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act because it believed that the Board has made it "excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization."

As noted, Section 8(a)(1) also entitles employees to engage in concerted activities for their mutual aid and protection. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court affirmed that employees with no bargaining representative or established procedure for presenting their grievances may nonetheless take collective and concerted action to air their grievances regarding terms and conditions of employment.

In this regard, the Board has determined employees who discuss their wage rates engage in protected activity. *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997). More recently, the Board has held that employees who complained about favoritism, wages, and bonuses engaged in protected activity. *North Carolina License Plate Agency*, 346 NLRB No. 34 (2006).

However, employees who misappropriate wage or other financial information of the employer may lose the protection of the Act even if they are engaging in concerted activity. *Roadway Express,* 271 NLRB 1238 (1984); *International Business Machines Corp.*, 265 NLRB 638 (1982).

In likewise, the Board has held that employee conduct characterized as "snooping" will not be extended the protection of the Act. *Canyon Ranch*, 321 NLRB 937 (1996).

The Board has defined concerted activity. When an employee acts with or on the authority of other employees, the employee is engaged in concerted activity. *Meyers Industry*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (*Meyers II*), cert. denied 487 U.S. 1205 (1988).

As noted in the recent case, *Ashville School,*[47] in which the administrative law judge was upheld, the following summary of the Board's interpretation of concerted activity (taken from *Diva Ltd.*, 325 NLRB 822 (1998)) is instructive:

> Since *Meyers* [*Meyers Industries (Meyers I)*], 268 NLRB 493 (1984), and *Meyers Industries (Meyers II*), 281 NLRB 882 (1986), the Board has found an individual employee's activities to be concerted when they grew out of prior group activity, when the employee acts formally or informal, on behalf of the group, or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. However, the Board has long held that for conversations between employees to be found protected concerted activity, they must look toward group action and that mere "griping" is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and its progeny. Id. at 830.

As the Board stated in *Holling Press, Inc.*, 343 NLRB 301 (2004):

> In order for employee conduct to fall within the ambit of section 7, it must be both concerted and engaged in for the purpose of "mutual aid or protection." These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

Accordingly, employees who simply pursue a personal claim, even with the assistance of other employees, may not be extended the protection of the Act under *Holling Press, Inc*., supra. In short, the employee must be shown to be seeking a collective goal and may not simply advance his or her personal claim.[48]

When the alleged 8(a)(1) violation turns, as here, on the employer's motive in taking an adverse action against an employee, the Board requires that the charge be analyzed under the framework set out in *Wright Line*, 251 NLRB 1083 (1968), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[49]

Under *Wright Line,* the General Counsel must establish (1) that the employees engaged in protected concerted activity; (2) the employer has knowledge of that activity; (3) animus or hostility toward this activity was a motivating factor in the employer's decision to take the adverse action in question against the employee.

Once the General Counsel establishes initially that the employee's protected activity was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 393 (1983).

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[47] 347 NLRB No. 84 (2006).

[48] See *Gartner-Harf Co.*, 308 NLRB 531 fn.1 (1992), where the Board noted that an employee's personal complaints about his own lack of work hours were deemed not protected.

[49] See *General Motors Corp.*, 347 NLRB No. 67 (2006), wherein the Board stated *Wright Line* applies to all 8(a)(3) and (1) allegations that turn on employer motivation.

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,[50] departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of union supporter from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.,* 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse,* 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.,* 303 NLRB 1039, 1044 (1991); *In-Terminal Service Corp.,* 309 NLRB 23 (1992); *Nortech Waste,* 336 NLRB 554 (2001); *Bonta Catalog Group,* 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medic One, Inc.*, 331 NLRB 464 (2000).

The employer's burden under *Wright Line* requires it "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services,* 271 NLRB 1302 fn. 2 (1984). The Board has held that "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his union activities. *Golden State Foods Corp.,* 340 NLRB 382 (2003).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004); *Yellow Ambulance Service,* 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.,* 343 NLRB 408 (2004).

Contentions of the Parties

With the foregoing in mind, we turn to the contentions of the parties.

The General Counsel contends first that Saladis unlawfully made a threat when he told Teed he would fire any drivers on the spot who discussed (among themselves) mileage, a matter the General Counsel asserts was the most important factor in determining a driver's pay.

He argues further that Saladis, who admitted that he made the offending remarks, was not persuasive or believable in his explanation of the conversation and its context. In any case, the General Counsel submits that Saladis' rationalization is self-serving and does not mitigate the unlawfully coercive nature of the remarks he made to Teed whom he clearly knew was concerned about another driver's preferentially receiving many more miles than he.

Regarding Teed's termination, the General Counsel submits that he has met his initial obligations under *Wright Line*. He asserts (and in my view beyond dispute) that mileage is the most significant factor in the Company's wage scheme for its drivers, and that the discussions among Teed and the other drivers about mileage clearly arose out of their concern for a vital term and/or condition of their employment, that is their earnings and possibly preferential treatment favoring one driver over another. As such, the General Counsel contends that these discussions were clearly protected. He further asserts that Teed's complaints about preferential treatment, coupled with those of other drivers, were part of his effort to protest and change adverse working conditions for himself and the other drivers; the goal of Teed's protest and his shared discussions with his fellow drivers about the mileage issue was for their mutual aid and protection.

The General Counsel argues that the drivers, mainly through Teed and Kross—both of whom addressed the mileage issue complaint with the Respondent's management—did so with a common complaint, not solely about raw mileage differences resulting from Saladis' assignment system but also the method he used to distribute routes. In this regard, the General Counsel asserts essentially that Teed and Kross collaborated in their effort to address the mileage issue, with Teed telling Kross to raise the matter with Scot and to use the mileage discrepancy with Vick as an example of Saladis' flawed route assignment system which inured to both drivers' detriment and gave a preference to Vick. In short, the General Counsel argues that Teed was acting concertedly with fellow drivers to achieve a more equitable distribution of mileage for all.

The General Counsel avers that the record amply demonstrates the Respondent's knowledge that Teed was upset with the amount of mileage he was receiving vis-à-vis another

[50] The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer's failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.,* 341 NLRB 492 (2004).

driver. He notes that Saladis himself admitted that Teed was a constant complainer and that Teed was talking to the other drivers. He argues that Whitmore stated that Saladis told her that Teed complained a lot and was not satisfied with his miles, that he was talking with the other drivers.

The General Counsel also notes that in the answering machine message and at the termination meeting, Saladis indicated that he knew of Teed's concerns about his mileage and that Teed felt that he (Saladis) played favorites in assigning routes. He argues that Saladis was clearly hostile to Teed's concerns as established by Saladis' telephoned threat to fire any driver on the spot if a driver discussed another driver's mileage.

Finally, the General Counsel asserts that he has proven the link between Saladis' hostility to Teed's activity and his decision to terminate him by dint of this earlier threat as well as Saladis' answering machine statement (notifying Teed to report for his termination meeting), which mentioned seniority and miles as reasons for the meeting.[51]

The General Counsel submits that the Respondent's stated reasons for terminating Teed—safety, (his) attitude and customer service are simply post hoc rationalizations and that the Respondent failed to meet its burden to show a legitimate nondiscriminatory motivation for its action against Teed.

The Respondent contends that the General Counsel failed to establish either that Saladis threatened Teed, and by extension other drivers, with termination for discussing mileage or that Saladis laid Teed off for engaging in protected concerted activity.

The Respondent asserts that Teed, in the first instance, was not a credible witness and suffered from such memory lapses and failures that he should not be believed. He asserts on the other hand that Saladis was eminently more credible and that his version of events should control.

Accordingly, the Respondent contends that with respect to the telephone conversation between Teed and Saladis, in which Saladis admitted he essentially told Teed he would fire any driver who went into another driver's truck to obtain mileage information, there is no violation of Section 8(a)(1) because "snooping" or misappropriating an employer's information is not protected activity and (presumably) could not constitute an unlawful threat.

The Respondent further asserts that Teed did not engage in concerted activity when he discussed mileage with his coworkers, that his discussions were merely reflective of his tendency to gripe and complain about Saladis' management style and newly imposed procedures. Moreover, the Respondent contends that Teed's discussions about mileage were not for the purpose of the mutual aid and protection of the drivers. To the contrary, the Respondent asserts, any of Teed's discussions were designed to advance Teed's personal interest in eradicating the mileage variation between himself and fellow driver Vick. Thus, Teed, in base terms, wanted more mileage for himself and thought he was being cheated by Saladis in the assignment of the routes that would garner more miles. In short, the Respondent argues that Teed's purpose in engaging in the discussion with the other drivers was to secure a personal benefit, and not for the mutual aid and benefit of the entire complement of drivers.

The Respondent also contends that the General Counsel's prima facie case was deficient in several other respects. While the Respondent concedes that the record establishes that Saladis was aware that Teed and the other drivers discussed among themselves the general topic of mileage, it contends that the General Counsel failed to show that Saladis was aware of the conversation Teed may have had with Kross, Olson, and Brown about the mileage on Vick's truck. The Respondent asserts this failure is fatal to the General Counsels' claim of retaliation against Teed by Saladis in the layoff decision.

The Respondent also contends that Teed lost the protection of the Act because he misappropriated information—Vick's odometer readings—that he discussed with his coworkers. The Respondent avers that Teed admitted he used his key to gain access to Vick's truck without Vick's knowledge or consent to obtain the mileage of which he complained to the other drivers. The Respondent argues here that such snooping is not protected.

Finally, the Respondent asserts that the General Counsel failed prima facie to establish that Teed's activity, even if deemed protected and concerted, was a substantial motivating factor in the Company's decision to lay him off.

Turning to its defense, the Respondent essentially asserts that it clearly established that the Company was overstaffed in August 2004, and for legitimate business reasons decided to implement a layoff. Moreover, the Company states that the drivers' discussion of mileage was common and generally ongoing, with drivers often complaining about not getting enough miles. Accordingly, the Respondent argues that driver mileage discussions and complaints, which on bottom constitutes the essence of Teed's complaints, is not the type of conduct that would make Teed (or any driver) a target for a retaliatory layoff.

The Respondent notes that the record is clear that Saladis never retaliated against employees who complained or who had concerns[52] and adds that Teed was the highest paid driver in 2003 and second highest in 2004, this in spite of his poor relationship with and griping to Saladis.

The Respondent asserts that Saladis selected Teed for layoff after considering who his best drivers were and would not be considered for layoff, along with those drivers who had certain serious employment issues and could be considered expendable. The Respondent asserts that Saladis selected Teed because of his safety issues and (poor) attitude. Saladis viewed Teed as a selfish and hostile, who over time made working with him impossible. The Respondent submits that Saladis was justified in selecting Teed for layoff for these reasons, and it would

[51] The General Counsel also argues that the timing of Teed's discharge supports a finding of unlawful motivation in that Kross spoke to Scot about Teed and Vick's mileage in August 2004 and Teed was discharged in early September.

[52] I note that the Respondent, in its brief at p. 30, states that Saladis continuously received information about the concerns of different drivers through "back channels" and would contact the driver in question and ask him to stop by and see him. In this way, Saladis felt that things did not fester.

have taken this action irrespective of Teed's having possibly engaged in protected activity.[53]

V. DISCUSSION AND CONCLUSIONS

A. The Threat Allegation

I will attempt to be brief but to the point regarding what I believe is the proper resolution of the issues in this case.

In agreement with the Respondent, I would find and conclude that Saladis did not unlawfully threaten Teed with discharge if they discussed other employees' mileage. My reasons are as follows:

Saladis essentially admitted at the hearing that he said he would fire a driver on the spot in the telephone conversation with Teed sometime in the summer of 2004, when Teed said that a driver had informed him (Teed) that Vick had 18,000 more miles on his truck. Saladis then went on to explain that he told Teed his reasons for taking that action against the anonymous driver, mainly that such a driver would have to have gone into another driver's assigned vehicle or the driver's personal mailbox to see his payroll records in order to obtain that information. Saladis said he viewed these transgressions to be fireable offenses and told Teed as such.

While Teed could recall the conversation, he could not recall with precision when it happened and he did not provide much detail to conversation. Thus, I would credit Saladis' version of the conversation and specifically his explication for making the statement and that he told Teed at the time his reasons for making it.

The issue is whether under the circumstances a reasonable employee would take Saladis' statement as a threat or interference with his Section 7 rights. I would conclude the statements would not.

In my view, even given what seems to be a deteriorating and perhaps hostile working relationship between the two, Saladis was merely reacting to what he viewed as a breach of company policy dealing with employee privacy rights. I note that there was testimony of at least one driver witness (Pergande) who said that he expected some degree of privacy with respect to his vehicle, that he did not think other drivers should enter his vehicle without his permission or knowledge.[54] Therefore, when confronted with Teed's assertion, Saladis responded with his view that a driver who went into another driver's truck without consent or permission should be fired and that he would be fired on the spot. It may be reasonably argued that given their poor relationship and the subject matter—alleged mileage variances between and among the drivers—Saladis' response was somewhat intemperate for a supervisor. However, in my view, the tone or the vehemence of Saladis' response does not translate into an unlawful threat. In my view, Saladis, on bottom, was telling Teed (and perhaps other drivers) that he took a very dim view of a driver's going into another driver's vehicle and obtaining information of a personal nature, not the least of which was financial. It seems entirely reasonable for a supervisor in the place of Saladis to inform an employee that behavior of this type is in contravention of company policy as the supervisor views the matter, and that he would fire any such offending employee. Accordingly, I would dismiss this allegation of the complaint.[55]

B. The Unlawful Layoff Allegations

Turning to the issue of Teed's layoff and the issue of whether the General Counsel has met its initial burden under *Wright Line* to show that he was treated unlawfully, in agreement with the General Counsel I would find and conclude that Teed engaged in protected concerted activity regarding the discussions he had with his fellow drivers about the distribution of mileage at Rock Valley. As stated by the General Counsel, the subject matter—mileage or the distribution thereof—related to and arose from the drivers' conditions of employment. It is undisputed that the amount of mileage received by a driver was integral to his wages and the more mileage received by a driver, the higher his wages. As Saladis noted, getting more mileage was a frequent and continuous issue for the drivers. Teed was no exception in this regard—he, too, wanted to get as much mileage as the next driver. From the inception of Saladis' tenure and the implementation of his route assignment system and procedures, the distribution of miles among and between the drivers was a matter of discussion and complaint which in turn resulted in meetings and formalization of the Company's procedures. I note that there appears to be controversy in this regard between the more senior drivers and the newer drivers hired by Saladis, with senior drivers such as Kross, but not necessarily Teed, believing that their seniority should give them some advantage in route assignments. In any case, Saladis, I believe, sincerely attempted to devise a methodology that would ensure some equality in mileage as well as something in the way of procedural regularity in the Company's operations.

In short, prior to April 2004, the distribution of mileage on the routes associated with higher mileage rates was certainly a matter of interest and perhaps some controversy among the Respondent's entire complement of drivers, in part because of the changes in company operations by Saladis and also because all drivers naturally sought to maximize their mileage. To be sure, Teed was one of those drivers who was most outspoken about what he saw were the sudden changes in the Company's operations and, as a consequence, did not in the end have a very good working relationship with Saladis.

However, in April 2004, the level of driver protests, if what had transpired previously could be descried as such, changed. In April, Teed discovered from Vick that Vick had substantially more mileage on his truck than did Teed; but the two had re-

[53] The Respondent also argues that because of the solidity of its reasons for laying off Teed, any argument of pretextual justification should likewise fail and should be rejected.

[54] Whether any of the Respondent's drivers has a reasonable expectation of privacy regarding the access to and the contents of his assigned vehicle is a debatable point inasmuch as all of the Company's trucks are keyed the same, giving any driver access to any of the fleet trucks. Evidently, all drivers did not share Pergande's view of the sanctity of a driver's vehicle.

[55] I note in passing that in the circumstances of this event, I am not persuaded by what I view are Saladis' rights under Sec. 8(c) of the Act. I also note that in expressing his views about employees possibly snooping around another driver's truck, Saladis did not threaten Teed who coached his concerns using an unnamed driver, not himself, who discovered the mileage variance.

ceived their respective trucks at about the same time, with only a negligible difference in mileage at the time of the assignment of the vehicles. With this discovery, Teed's generalized complaints, gripes if you will, to me were transformed into a complaint of favoritism or preferential treatment by management in the distribution of routes. His subsequent actions, including revealing his discovery to the other drivers, discussing the mileage disparity in terms of its effect on the drivers' wages, asking a driver (Kross) to bring the matter up in a meeting with management about the issue of mileage and procedures for the distribution were all part of his effort to protest preferential or favored treatment and to change working conditions for all the drivers, not just himself. I would in that light find and conclude that Teed's action was concerted.

I note in that regard that Kross and Teed approached management individually, but their clear common goal and purpose was to effect a change from what they perceived to be possibly a flawed assignment process which created favoritism and preferential treatment for Vick, who was hired by Saladis personally and whom he regarded as one of his "stars." I note that in his conversation with the other drivers, Teed never mentioned that he wanted more miles for himself, but that Vick had many more miles than he when they were assigned new trucks about the same time The clear message he conveyed to the other drivers were that they as a group may not be receiving assignments fairly and equitably.

It seems then that at the least, Teed was acting concertedly with Kross to achieve a change in their working conditions, mainly to achieve a more equitable distribution of mileage. However, in my view, Teed acted concertedly as well as with the other drivers with whom he discussed his revelation and concerns which he thought affected them as a group.[56]

On the issue of the Respondent's knowledge of Teed's having engaged in protected activity, I believe, in agreement with the General Counsel, the record amply demonstrates this element. First, Saladis admitted that he was aware Teed was upset about his mileage and that he was complaining to other drivers. Saladis also admitted that he received information from and about his drivers' concerns and complaints through what he described as "back channels," one of which in all likelihood was Scot to whom Kross mentioned in their meeting Teed's concerns about mileage. Saladis testified that Scot had kept him informed of driver concerns on other occasions—leading to the driver-management meetings. In my view, Scot, who did not testify, possibly gave Saladis a "back channel heads-up" about his conversation with Kross and that Kross had mentioned Teed's reported concerns about the mileage variance. I note further that Whitmore said that Saladis told her of Teed's constant complaining, and specifically he was not satisfied with his miles vis-à-vis Vick's mileage. Finally, at the termination meeting, Saladis acknowledged not only Teed's complaints about miles but what Teed viewed as the crux of the problem—Saladis' preferential (playing favorites) assignments of routes. The General Counsel clearly, in my view, satisfied the knowledge element of the *Wright Line*.

As to the animus issue, I note that the Respondent contends that the General Counsel's case hangs by the thinnest threat possible, that is, Saladis' threat to terminate drivers who discussed their mileage. I disagree.

In my view, while I have determined that Saladis' retort was not an unlawful threat, it certain constitutes the type of hostility to a worker's assertion of legitimate Section 7 concerns—here fair and equitable treatment in the assignment of routes and concomitant mileage factors, which form the core of a Rock Valley's driver's ability to make a viable living—that is envisioned by Board law.

Notably, Teed's statement, that a driver informed him that Vick had 18,000 more miles than he, was predicated on his concerns that a fellow driver may be getting preferential treatment (perhaps) because Teed felt the driver did not charge the Company for downtime. Instead of calmly answering Teed's question directly and on point, Saladis launched into a tirade about firing the person who told Teed about Vick's mileage, citing some company policy (that existed in Saladis' head or written down in some unknown place) that protected the drivers' purported privacy rights in the operation of their assigned vehicles. In my view, Saladis exhibited actionable hostility to Teed's claim of preference and/or favoritism. I would find and conclude that the General Counsel met his burden under *Wright Line*.

I note in passing that in my view, contrary to the Respondent, Teed did not lose the protection of the Act by unlocking and entering Vick's truck without Vick's knowledge and consent to obtain Vick's mileage. First and foremost, the record is clear that all of the Respondent's leased vehicles assigned to the drivers are keyed identically. Saladis did not explain the reasons for this, but one can reasonably speculate that the Company wanted the benefit of identical keys so that the individual truck could be operated if need be irrespective of whether the driver technically assigned to it were available. Under these circumstances, Teed or any driver for that matter could at any time be called upon to operate a truck to which he was not regularly assigned and, of course, check the odometer readings for legitimate business purpose—determining the mileage he had driven in the truck. So, while some drivers may have taken a proprietary stance regarding the sanctity of their assigned trucks, in point of fact, the assigned truck was not their private property. Accordingly, as I see it, there was no reasonable expectation of privacy by drivers in the odometer readings of their assigned vehicles.[57]

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[56] In this regard, contrary to the Respondent's assertions, I found both Teed and Kross credible. It is true Teed had some difficulties with dates and some details. However, even with these lapses, he spoke forthrightly, candidly, and sincerely. Moreover, much of his testimony was corroborated either by other witnesses or other evidence of record. Kross also had some memory issues, and I would acknowledge he was not sanguine about or towards the Company and perhaps Saladis in particular. However, I did not find him evasive or hesitant. He answered as best he could all questions propounded to him by the General Counsel or the Respondent's counsel. Then, too, the tape recording is highly corroborative of material parts of his testimony.

[57] As I listened to the drivers who testified about the issue, it seems their concerns for privacy and the matter of trust among the drivers related more to the issue of their personal belongings that drivers may have kept in their vehicles. Mileage was freely discussed among the

I also note that to the extent Teed may be said to have "misappropriated" the mileage reading from Vick's trucks, he did not give the information to any outside entities or sources. Rather, he discussed the matter only with his fellow drivers and the Respondent's management based on Vick's revelation of the amount of miles he had driven. In my view, Teed was not simply snooping around another driver's truck; he was concerned about preferential treatment and took action to determine if this was in fact going on. If a driver's mileage readings were actually deemed confidential, the Respondent should have issued to the drivers individual keys or perhaps put appropriate notices on the vehicles—none of which was done.

The Respondent essentially asserts that Teed was laid off for legitimate nondiscriminatory reasons. First, I would find and conclude that at around the time Saladis decided to lay off a driver, the economic circumstances in which the Company found itself justified, as argued by the Respondent, a layoff due to an overstaffed driver complement. Second, I would also find and conclude that the Respondent was and is entitled as a general proposition to consider a driver's poor "attitude" toward and about his job; his safety record and customer service record, and exclude seniority, as bases for laying off the employee in question. Accordingly, in my view, the reasons asserted by the Respondent here constitute a plausible justification for laying Teed off.

I note that Saladis credibly testified about Teed's attitude, at least as he considered it. Saladis felt that Teed was a constant complainer and was interested solely in his own issues on the job. Saladis in so many words did not consider Teed to be a team player. Teed was a person disposed to disagreement and explosive temper when challenged.[58] Saladis also credibly testified about Teed's safety record, including Teed's loss of his safety bonus for 2003. Safety and the proper operation of the vehicle was a primary concern of Saladis and he, in fact, had fired a driver (Griffin) for log book violations.

Finally, it seems entirely proper to me for Saladis, when faced with an overstaffing issue during an economic downturn, to consider the totality of the records of all the drivers, including his personal views of their worthiness for retention in selecting one of them for layoff. It could be gainsaid that all of these factors in varying degrees were put into play by Saladis at the time he made the decision to lay off a driver.

The issue for me, however, is whether Saladis as he testified, fairly and irrespective of Teed's having engaged in protected concerted activity, selected Teed and would have selected him for layoff even if he had not engaged in protected activity. In short, was Teed's action during the summer of 2004 the motivating factor or a substantial motivating factor in Saladis' selection?

As noted, the Respondent has the burden of persuasion after the General Counsel has met its initial burden. I would find and conclude that the Respondent has failed to meet its burden. My reasons are as follows:

drivers so it would seem that no driver was particularly concerned about maintaining the confidentiality of his mileage.

[58] Teeds himself acknowledged that he was outspoken and tended to become loud when excited or challenged by management.

In my view, Saladis considered Teed, at least after a time, to be a problematic employee, one who evidently caused him much consternation and frustration. This was evident even as Saladis testified and related his experiences in dealing with Teed. However, given this, Saladis retained Teed, who by Saladis' own admission was a high earner. Therefore, I would assume, even with Teed's vexatious "attitude," that Saladis did not consider Teed's behavior so objectionable to merit serious disciplines.

Notably, with respect to Teed's safety issues, these resulted only in his losing his safety bonus on one occasion and being warned. While Teed received a safety warning on September 2, 2004, 2 days before his layoff, Saladis had already made his decision to lay him off. In this regard, I viewed this last discipline as make-weight and, in all candor, it undermined the Respondent's defense in my eyes.

Two other factors loom largely in this case. One is the timing of the layoff and Teed's protests over the summer, around July and August 2004. In this regard, the layoff decision becomes suspicious and in this regard also undercuts the bona fides of the Respondent's defense. The other factor is Saladis' hostility to Teed's discussing mileage with other drivers in their telephone conversation in April. During the next 4 months, it seems that Teed embarked on what seems to be a small scale campaign to advise the drivers of the variance in mileage between him and Vick. Teed went so far as to advise Kross to discuss the variance with Saladis' boss, Scot, going over Saladis' head as a result. Saladis, as I have found, knew of this and coupled with his hostile remarks to Teed over the telephone, in my view, harbored animus against Teed up to the time of the layoff. In my view, Saladis seized the opportunity presented by the business turndown to get rid of not only a problematic employee, but one who had in essence accused him of favoritism in the assignment of routes. Consequently, Saladis' decision to lay Teed off was tainted and inextricably so by his anger over Teed's engaging in protected activity. I would find and conclude, based on the foregoing as well as the entire record herein, that in selecting Teed for layoff, the Respondent violated the Act, and I will make an appropriate recommended remedial order.

Conclusions of Law

1. The Respondent, Rock Valley Trucking Co., Inc., of Janesville, Wisconsin, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by permanently and indefinitely laying off employee James W. Teed on September 4, 2004.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
4. The Respondent has not violated the Act in any other manner or respect.

Remedy

Having found that the Respondent has engaged in an unfair labor practice, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent's having discriminatorily permanently laid off its employee, James W. Teed, it must offer him immediate reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of wages and benefits. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also recommend that within 14 days after service, the Respondent be ordered to post, by Region 30 at its Janesville, Wisconsin facility copies of an appropriate "Notice to Employees," a copy of which is attached as "Appendix," for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[59]

ORDER

The Respondent, Rock Valley Trucking Co., Inc., of Janesville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently or indefinitely laying off employees because they engage in protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James W. Teed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify the James W. Teed in writing that this has been done and that the layoff will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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[59] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

d) Within 14 days after service by the Region, post at its facility in Janesville, Wisconsin, copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the "Notice to Employees" to all current employees and former employees employed by the Respondent at any time since September 4, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT permanently or indefinitely lay off employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the Act.

WE WILL, within 14 days from the date of this Order, offer James W. Teed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James W. Teed whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

[60] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoff of James W. Teed, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

ROCK VALLEY TRUCKING CO., INC.